No. 84-814 (1)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF OCEANSIDE,

Petitioner,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Federal Emergency Management Agency ("FEMA") may properly deny coverage under a federal flood insurance policy based on the insured's failure to file a proof of loss form within 60 days of the loss, when said failure is a result of reliance on the acts of FEMA in continuing to investigate the loss beyond the 60 day period and failing to request a proof of loss form within the 60 day period.

2. Whether estoppel and waiver may be applied to FEMA, acting as a federal insurer, under circumstances where no significant governmental function is threatened and where the failure to do so would impose a substantial loss on the plaintiff for failure to comply with a technical policy condition.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF OCEANSIDE,

Petitioner,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY,

Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner CITY OF OCEANSIDE respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 19, 1984.

[1] Other defendants to the underlying action are Electronic Data Systems Federal Corporation and Jack Carlisto Enterprises, Inc.

OPINION BELOW

The Memorandum of the Court of Appeals, not reported, appears in the Appendix hereto. The order of the District Court for the Southern District of California appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 19, 1984. A timely petition for rehearing was denied on August 7, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On April 27, 1981, Petitioner, CITY OF OCEANSIDE ("CITY"), filed suit against the FEDERAL EMERGENCY MANAGEMENT AGENCY ("FEMA") and JACK CARLISTO ENTERPRISES, INC. ("CARLISTO") in the United States District Court for the Southern District of California for enforcement of a flood insurance policy issued by FEMA covering CITY'S sewage treatment plant. The plant was insured against flood damage under a valid policy of insurance underwritten by the National Flood Insurance Program, 42 U.S.C. Section 4001, et seq., which is administered by Respondent FEMA. The policy was secured at the request of CITY by defendant CARLISTO. The complaint was amended on December 14, 1982, to add defendant ELECTRONIC DATA SYSTEMS FEDERAL CORPORATION ("EDS"), a servicing agent for FEMA with respect to the policy in issue.

The sewage treatment plant sustained damage during a flood on February 18, 1980. Following the flood, CITY provided a notice

of loss to FEMA, and FEMA employed the services of an adjuster, Walsh Adjusting Company. The adjuster inspected the damage to the sewage plant and had contact with CITY'S Risk Manager. On April 2, 1980, within 60 days of the loss which occurred February 18, 1980, the CITY sent to FEMA's representative a notice of loss which included estimates of the damage to the facility (Exhibit 2 to Appellant's Brief, below). This was after several face-to-face discussions between the parties and an inspection of the subject property, including photographing by FEMA's representative. Thereafter, CITY sent to FEMA's representative all copies of estimates, invoices and expenses for labor and cleanup.

In July of 1980, FEMA requested a second opinion and a consulting engineer for FEMA consulted with the CITY and viewed the scene. In August, another consultant and FEMA's representative met with the insured and negotiated the price of the generator loss (Exhibit 3 to Appellant's Brief, below). On December 10, 1980, FEMA's adjuster told CITY that he would send a check for $8,329.60 and a proof of loss form to be filled out by CITY. This offer was withdrawn on December 11, 1980.

On December 12, 1980, FEMA denied CITY'S claim on the ground that the damaged sewage plant equipment was located outside the building whose contents were insured under the policy. On April 27, 1981, Petitioner filed the instant suit for enforcement of the insurance policy covering the sewage treatment plant. The damages were alleged to have been covered by a Flood Insurance Policy issued pursuant to the National Flood Insurance Act. 42 U.S.C. Section 4001, et seq. Jurisdiction was predicated on 42 U.S.C. Section 4053.

On February 18, 1983, Respondent FEMA filed a Motion to Dismiss and/or in the Alternative for Summary Judgment on the ground, *inter alia*, that CITY was barred from maintaining its action for failure to comply with the terms and conditions of the flood insurance policy, specifically, failure to file a proof of loss within 60 days of the date of loss. On February 23, 1983,

defendant EDS joined with defendant FEMA in its Motion to Dismiss and/or Summary Judgment.

At no time within 60 days of the loss did FEMA or its agents request a proof of loss or provide the form for said proof of loss to the CITY to fill out, although they continued to investigate CITY'S loss during this time. This defense was not raised as an affirmative defense in FEMA's Answer to the Complaint herein but was first raised by Respondent FEMA's Motion for Summary Judgment filed on February 18, 1983, exactly three years from CITY'S date of loss. City filed a formal proof of loss on March 21, 1983 (Reporter's Transcript, p. 25, ll. 2-5).

On March 21, 1983, the District Court granted FEMA's Motion for Summary Judgment on the ground that CITY had failed to file a proof of loss. The court held that strict compliance with the terms and provisions of the insurance policy was required. This order finally disposed of all claims except as to defendant CARLISTO. The complaint against defendant CARLISTO was ordered to be held in abeyance pending resolution of this issue by the Ninth Circuit Court of Appeals.

A timely Notice of Appeal was filed on April 14, 1983. On June 19, 1984, the Ninth Circuit Court of Appeals affirmed the District Court's order granting summary judgment. In a memorandum of opinion, the Court held that Petitioner's failure to submit a timely proof of loss form precluded coverage under the flood insurance policy.

On July 3, 1984, Petitioner filed a Petition for Rehearing with the Ninth Circuit Court of Appeals. The Petition for Rehearing was denied on August 7, 1984. The instant Petition for Certiorari was filed within 90 days of that date.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AS TO THE EFFECT OF A FAILURE TO SUBMIT A TIMELY PROOF OF LOSS WHEN SUCH FAILURE RESULTS FROM RELIANCE ON FEMA'S ACTS.

In the instant case, the Ninth Circuit Court of Appeal was required to decide the effect of CITY'S failure to submit a timely proof of loss, which failure resulted from reliance on the acts of the government insurer FEMA. The Court held that the CITY'S failure to submit a timely proof of loss from precluded coverage of its claim under a Standard Flood Insurance Policy underwritten by the federal government. This decision is directly in conflict with several other Court of Appeal decisions involving the identical issue.

In *Meister Brothers, Inc. v. Macy*, 674 F.2d 1174 (7th Cir., 1982), the Seventh Circuit Court of Appeal held that FEMA was estopped from raising as defense to a claim for flood damages the claimant's failure to file a timely proof of loss. The claimant had filed a notice of loss with FEMA. FEMA sent an adjuster to investigate the claim within 2 days of the loss. The adjuster continued to investigate the claim throughout the 60 day period. At no time in the 60 day period did the adjuster ever tender to the claimant a proof of loss form so as to indicate that anything other than notice of loss must be filed by claimant within the 60 days. The Court's holding that FEMA was estopped to raise the defense of a proof of loss was based on the adjuster's failure to tender a proof of loss form to the claimant within the 60 day period, and also the adjuster's reports provided FEMA with all the information it would have had had a proof of loss been filed. Further, FEMA made partial payment on an untimely filed proof of loss.

An opposite result was reached by the Fourth Circuit Court of Appeal in *West Augusta Development Corporation v. Giuffrida*, 717 F.2d 139 (4th Cir., 1983). However, the Court in *West Augusta* used reasoning consistent with *Meister Brothers, supra*, in reaching its decision. In *West Augusta*, the Court held that FEMA could deny coverage under a flood policy for failure of the claimant to file a proof of loss. The Court's decision was based on the fact that, unlike *Meister*, the claimant failed to establish that FEMA took any action prior to the end of the 60 day period on which the insured could reasonably have relied in failing to file a proof of loss. The Court recognized that the general rule that estoppel cannot be asserted against the government is in some flux, and *the lower federal courts in particular are in disagreement about the applicability of estoppel in cases involving failure to file timely proof of loss. Id.* at 140. However, the Court stated that all decisions require that the party asserting estoppel against the government establish conduct by a government agent or entity that has induced reasonable detrimental reliance by a private party. The Court recognized that such conduct included investigation of the loss by FEMA prior to the time the 60 day filing period had ended.

In both *Meister Brothers, supra*, and *West Augusta, supra*, the Seventh and Fourth Circuit Courts of Appeal recognized that FEMA's investigation of a claim within the 60 day filing period, and its failure to produce a proof of loss form within this time is conduct that would estop the government from raising the defense of failure to file a proof of loss.

Despite the clear trend established by the Courts of Appeal, the Ninth Circuit Court of Appeal has reached a contrary holding in the instant case. It is uncontroverted that FEMA, through its adjusters, continued to investigate petitioner's loss well beyond the 60-day period for filing a notice of loss. At no time during this period did FEMA provide petitioner with a proof of loss, although they continued to investigate petitioner's claim. Further, FEMA, through its adjusters, told petitioner that they would make a

payment under the policy. However, the offer was withdrawn and coverage was denied on grounds unrelated to petitioner's failure to file a proof of loss. This defense was first raised by FEMA's Motion for Summary Judgment, filed three years after the date of petitioner's loss. The uncontroverted facts in the instant case establish conduct by FEMA that has been held sufficient to invoke estoppel by the Fourth Circuit and Seventh Circuit Courts of Appeal.

The Second Circuit Court of Appeal has affirmed a decision that is clearly contrary to the decisions in *Meister Brothers, supra*, and *West Augusta, supra.* In *Pavone, Inc. v. Secretary of Housing and Urban Development*, 547 F.Supp. 230 (D.Conn. 1982), *aff'd*, 697 F.2d 295 (2d Cir., 1983), the Second Circuit affirmed a decision holding that even continuing negotiations would not estop FEMA from relying on the proof of loss requirement. The Ninth Circuit Court of Appeal came to the same conclusion in *Roberts v. Federal Crop Insurance Corp.*, 158 F.Supp. 688 (E.D. Wash. 1958), *aff'd*, 260 F.2d 958 (9th Cir., 1958). Although *Roberts* involved a crop insurance policy, relevant paragraphs in the policy were substantially the same as those in the flood insurance policies issued by FEMA.

Accordingly, a conflict exists among the Courts of Appeal as to the effect of a failure to submit a proof of loss as a result of reliance on the acts of the government. The decision of the Second Circuit Court of Appeals in *Pavone, supra*, as well as the decision of the Ninth Circuit Court of Appeal in *Roberts, supra*, and in the instant case, is in conflict with the decisions of the Fourth Circuit and Seventh Circuit on identical issues.

These conflicts justify the grant of certiorari to review the judgment below.

II.

THE DISTRICT COURTS ARE ALSO IN CONFLICT AS TO THE EFFECT OF A FAILURE TO SUBMIT A TIMELY PROOF OF LOSS WHEN SUCH FAILURE RESULTS FROM RELIANCE ON FEMA'S OWN INVESTIGATION OF THE LOSS AND FAILURE TO REQUEST A PROOF OF LOSS.

As discussed above, the Courts of Appeal are in conflict as to the effect of failure to submit a timely proof of loss which resulted from reliance on the act of the government insurer. Likewise, the District Courts are also in conflict on this issue. In two recent decisions, the District Courts have held that the insured's failure to file a proof of loss within 60 days did not constitute a defense for FEMA.

In *Bolton v. Giuffrida*, 569 F.Supp. 30 (N.D. Cal. 1983), the District Court held that FEMA was estopped to assert failure of the insureds to file a proof of loss within 60 days. The Court relied on *Meister Brothers, Inc. v. Macy*, 674 F.2d 1174 (7th Cir., 1982), and held that the application of estoppel against the government was consistent with the Ninth Circuit requirements for invoking estoppel. Thus, *Bolton*, a published District Court opinion within the Ninth Circuit, reaches the opposite conclusion from the instant unpublished Ninth Circuit decision on identical facts.

In *Dempsey v. Director, Federal Emergency Mgmt.*, 549 F.Supp. 1334 (E.D. Ark. 1982), the Court held that the insured's failure to file a proof of loss within 60 days of the loss did not constitute a defense for FEMA.

A conflicting decision was reached by the District Courts in *Continental Imports v. Macy*, 510 F.Supp. 64 (E.D. Pa. 1981) and *Cross Queen, Inc. v. Director, Federal Emergency Management Agency*, 516 F.Supp. 806 (D.C.V.I., 1980), where the District Courts held that the insureds *were* precluded from recovery for

failure to file a timely proof of loss form. In *Cross Queen, Inc., supra*, the Court stated that general doctrines of waiver are not applicable where the insurer is an agency of the United States. This rationale was followed in *Continental Imports, supra*.

Thus, like the Courts of Appeal, the District Courts are in conflict as to the effect of a failure to file a timely proof of loss resulting from reliance on acts of the government insurer.

These conflicts justify the grant of Certiorari to review the judgment below.

III.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING COVERAGE UNDER INSURANCE POLICIES ISSUED BY THE FEDERAL EMERGENCY MANAGEMENT AGENCY.

The Ninth Circuit Court of Appeal in the instant case is in conflict with both Court of Appeal decisions and District Court decisions based on identical facts and issues. The resulting uncertainty of the law in this area has created a problem of major significance with far reaching effects. As evidenced by the large number of cases decided on issues identical to the instant case, the Federal Emergency Management Agency has increasingly raised the defense of a failure to file a proof of loss to preclude coverage under insurance policies issued by the federal government. Often, this defense is raised as a last chance effort by FEMA to avoid paying on an insurance policy where the policy holder has refused to accept FEMA's offer of settlement. This is evidenced by the facts of the cases cited above.

In the instant case, FEMA belatedly raised the defense of failure to file a proof of loss three years after the date of loss. In *Meister Brothers v. Macy*, 674 F.2d 1174 (7th Cir., 1982) the defense was

not raised until more than two years after the date of loss; in *Bolton v. Guiffrida*, 569 F.Supp. 30 (N.D. Cal. 1983), the insured's claim was denied eight months after the date of loss, and in *Dempsey v. Director, Federal Emergency Management*, 549 F.Supp. 1334 (E.D. Ark. 1982), the defense was raised over one year after the date of loss. Further, in the instant case, as well as *Bolton, supra, Meister, supra,* and *Dempsey, supra*, coverage under the government issued policies was initially denied on *unrelated* coverage questions, and the defense of proof of loss was raised by way of Motion for Summary Judgment after suits had been filed regarding the initial coverage denial. Accordingly, it is clear that FEMA, in all of these cases, has belatedly raised the proof of loss defense after suit was commenced because of an unrelated coverage conflict.

Courts that have denied coverage based on the proof of loss defense are upholding a technical defense that is not available under California law, nor under the law of a majority of states. 17 A. Appleman, *Insurance Law and Practice*, 258-265 (1981). In effect, FEMA, as an insurer, is denying coverage on a basis not available to any other insurer.

In recognizing that FEMA's conduct threatened to work a serious injustice to plaintiffs, the court in *Bolton, supra*, held:

> "the Congressional purpose behind establishing national flood insurance ws to alliviate the personal hardship and economic distress created by flooding by making flood insurance coverage available upon *reasonable* terms and conditions. 42 U.S.C., Section 4001(a), (b); *Dempsey v. Director, Federal Emergency Management Agency*, 549 F.Supp. 1334, 1340 (D.D.C., 1982). It was not reasonable for FEMA to impose upon plaintiffs the condition of filing a proof of loss when FEMA continued to treat plaintiff's loss as subject to coverage under the policy well after the 60-day

period for filing a proof of loss had run. The injustice threatened to plaintiffs if the estoppel doctrine is not applied against FEMA is that they will not be covered for a loss arguably caused by flooding, though they took out flood insurance which was supposedly based upon reasonable terms and conditions, by FEMA's belated and unjustifiable assertion of a technical defense. *Id.* at 35.

CONCLUSION

As set out above, the status of the law on the effect of a failure to file a proof of loss under a policy issued by the federal government is in conflict in both the Courts of Appeal and the District Courts. The current unsettled status of the law on this matter tends to work a serious injustice on a large number of persons.

The Congressional purpose behind establishing national flood insurance was to make flood insurance coverage available upon ***reasonable*** terms and conditions. The conflicting authority as to the effect of a failure to file a proof of loss allows FEMA to belatedly and unjustifiably assert this technical defense to defeat litigation which has arisen under unrelated coverage questions. This result is not fair, is not right, and is clearly contrary to the Congressional purpose behind establishing federally funded flood insurance.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeal below.

Respectfully submitted,

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APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 19 1984

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

CITY OF OCEANSIDE,

Appellants,

vs.

FEDERAL EMERGENCY MANAGEMENT AGENCY,

Appellees.

No. 83-5747
D.C. No. 81-0380-T

MEMORANDUM*

An Appeal from the United States District Court
Southern District of California
Hon. Howard B. Turrentine, Judge Presiding
Argued and Submitted June 4, 1984

Before: ELY, PREGERSON, and ALARCON, Circuit Judges

The City of Oceanside appeals from the district court's order granting summary judgment in favor of appellees Federal Emergency Management Agency (FEMA) and Electronic Data Systems, Inc. (EDS). The district court held that Oceanside's failure to submit a timely proof of loss form precluded coverage of its claim under a standard flood insurance policy underwritten by the federal government, issued by FEMA and administered by EDS. Although the district court's order did not finally dispose of all claims against all parties, a motions panel of this court

* The panel has concluded that this appeal presents issues that do not meet this court's standards for disposition by written opinion. *See* 9th Cir. R. 21. Therefore, we order disposition by memorandum rather than by publication in the *Federal Reporter*. This memorandum may not be cited to or by the courts of this circuit.

interpreted the district court's order as intending to certify the issue for interlocutory appeal under Fed. R. Civ. P. 54(b), and accepted the appeal. We affirm the district court's order granting summary judgment and remand for resolution of the remaining claims.

Oceanside argues that appellees did not plead the failure to submit proof of loss with the specificity required by Fed. R. Civ. P. Rule 9(c). Under Rule 9(c), denial of performance or occurrence of a condition precedent "shall be made specifically and with particularity." Appellees specifically denied that all conditions precedent to coverage had occurred, but they failed to identify the conditions precedent the believed were unfilled, which is required under Rule 9(c). *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* (Civil) § 1304 at 432 (1969).

The district court granted summary judgment for appellees based on Oceanside's failure to submit a timely proof of loss without commenting on Oceanside's objection that the matter was not properly pleaded under Rule 9(c). We find that the district court, in accepting the proof of loss defense without comment, was essentially allowing appellees to amend their pleadings. We conclude that allowing amendment was proper. As commentators have noted, courts should be liberal in allowing pleadings to be amended to conform with Rule 9 requirements. 5 C. Wright & A. Miller, *Federal Practice and Procedure* (Civil) § 1300 at 425 (1969).

Oceanside argues next that the district court was incorrect in granting summary judgment for appellees. We must determine de novo whether there is any genuine issue of material fact and whether appellees were entitled to summary judgment as a matter of law. *See M/V American Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483, 1487 (9th Cir. 1983).

Here, the facts are undisputed. There is no genuine issue of material fact. Both parties agree that Oceanside did not submit a sworn proof of loss as required by Paragraph P of the Standard

Flood Insurance Policy. See 44 C.F.R. part 61, Appendix A(2) at 221 (1983). The parties disagree only as to whether undisputed facts compel the conclusion that the government either waived the proof of loss requirement or is estopped to assert it. We discuss waiver and estoppel in turn.

1. **Waiver**

Waiver in this context is an indication by the insurer that it will not enforce certain policy provisions against the insured. Here, Paragraph D of the Standard Flood Insurance Policy unambiguously states that no provisions of the policy may be waived except in writing. It is undisputed that there was no written waiver of the proof of loss condition here. Thus, Oceanside cannot rely on the doctrine of waiver.

2. **Estoppel**

The elements of estoppel are set out in *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979);

> (1) The party to be estopped must know the facts;
>
> (2) He must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel has a right to believe it is so intended;
>
> (3) The latter must be ignorant of the true facts; and
>
> (4) He must rely on the former's conduct to his injury.

According to undisputed facts in the record, we find that Oceanside cannot establish either the third or the fourth element of the above test. Regarding the third element, there was no reason for Oceanside to "be ignorant of the true facts." The proof of loss requirement was set forth clearly in the Standard Flood Insurance Policy at Paragraph P, and the policy is codified at 44 C.F.R. Part 61, Appendix A(2) at 221 (1983). Oceanside admitted that its employees had access to the policy and were familiar with its terms. We note that the Supreme Court has refused to find estoppel based on a government agent's erroneous advice even where the plaintiff did not have access to the applicable regulations. *See Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam) (government agent's misrepresentation that applicant was not entitled to welfare benefits not held to work an estoppel even though applicant had no access to complex regulations and relied entirely on government agent's advice).

Oceanside also fails to establish the fourth element of the above test. Oceanside's failure to file proof of loss does not seem to be due to any reliance on the statements or conduct of government agents. An Oceanside employee testified that he relied on his experience that private insurance companies waived proof of loss, "99.9% of the time because it is absolutely unnecessary and it is a burden on the insured."

Thus, Oceanside does not produce facts that would satisfy the ordinary requirements of estoppel, let alone the heightened requirements for an estoppel against the government. *See Heckler v. Community Health*, No. 83-56 (May 21, 1984) (noting historical reluctance on the part of federal courts to hold that the federal government can be estopped.

Finally, Oceanside argues that the adjuster hired by the government failed to give it a proof of loss form as required by an adjuster's manual. Oceanside argues that this failure to follow procedures prescribed in the manual is tantamount to the affirmative misrepresentations that this court on occasion has held will work

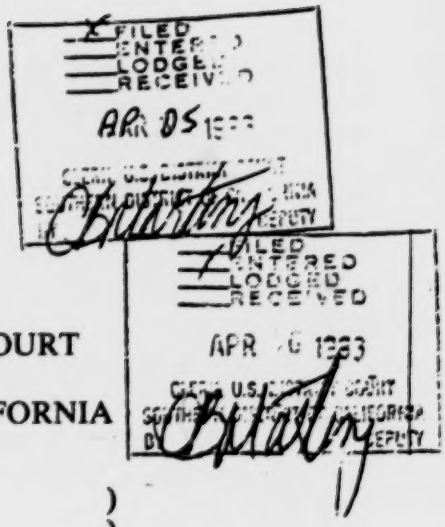
an estoppel against the government. *See, e.g., United States v. Lazy F C Ranch*, 481 F.2d 985 (9th Cir. 1973) (misrepresentation that elaborate leasing agreement would make ranch available for Soil Bank payments held to work an estoppel); *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975) (Bureau of Land Management officials misrepresented that there was no way for claimant to gain title to land when in fact there was an application procedure; held to work an estoppel). The Supreme Court has held, however, that deviations from practices set forth in government manuals are not sufficient to work an estoppel. *See Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981) (fact that a field representative of Social Security Administration failed to follow a manual and neglected to recommend that claimants file a written application held not to result in estoppel). Thus, we find Oceanside's reliance on the adjuster's manual unpersuasive.

In sum, we hold that according to undisputed facts in the record, Oceanside cannot demonstrate that it would be entitled to assert an estoppel against a private litigant, let alone meet the much stricter requirements for an estoppel against the federal government. We therefore affirm the district court's summary judgment holding that Oceanside's failure to submit the required proof of loss form precludes coverage.

The case is remanded to the district court for consideration of remaining claims.

AFFIRMED.

B-1



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CITY OF OCEANSIDE, Plaintiff, v. FEDERAL EMERGENCY MANAGEMENT AGENCY, JACK CARLISTO ENTERPRISES. INC., and DOES I through XX, Inclusive, Defendants. AND ALL RELATED CROSS-ACTIONS	Civil No. 81-380-T **ORDER**

The above-entitled matter came before the court on motion by defendants Federal Emergency Management Agency ("FEMA") and Electronic Data Systems Federal Corporation ("EDS") for dismissal or in the alternative for summary judgment. The court, having read and considered the papers filed by and on behalf of the parties and having reviewed the applicable statutory and case law, concludes that defendants FEMA and EDS should be granted summary judgment in plaintiff's underlying action. This court

will retain jurisdiction over all cross-actions and over plaintiff's action against defendant Jack Carlisto Enterprises, Inc.; all further proceedings in those actions will be stayed pending appeal of the summary judgment.

Plaintiff City of Oceanside, pursuant to 42 U.S.C. §4072, brought this action for proceeds of a Standard Flood Insurance Policy issued to it under the National Flood Insurance Program by the Federal Emergency Management Agency. The dispute revolves around whether certain of the City's flood-damaged property is covered under the policy and who is liable if the property is or is not covered. Various cross-claims and counterclaims have been filed.

A condition precedent to bringing a suit such as the City's is that a written proof of loss be submitted to the insurer by the insured within sixty days after the loss; the sixty day time period can be extended only by the insurer in writing. The proof of loss requirement is set forth in Paragraph O of the General Conditions and Provisions in the Standard Flood Insurance Policy[1] entered into by the City. (See Exhibit 1 of complaint.) And, Paragraph T of the General Conditions and Provisions makes submission of the proof of loss a condition precedent to bringing suit:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with. . . .

The record reflects and the parties are in agreement that no proof of loss was submitted to the insurer within the sixty day period and that no extension of time was granted in writing by the insurer. The City argues that FEMA waived the proof of loss requirement because neither FEMA nor its agents formally

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[1] The Standard Flood Insurance Policy is codified at 44 C.F.R. Part 61, Appendix A(2).

requested the document and because the processing of the claim continued even after the sixty day period had ended.

The Standard Form Insurance Policy, however, in Paragraph D of the General Conditions and Provisions, provides that no provision of the policy can be waived except in writing. And, while it is true that *private* insurers are often held to have waived the requirement of a proof of loss by their actions and representations (e.g. by not asking for the document; by entering into negotiations for settlement of the claim) the proof of loss requirement in the Standard Flood Insurance Policy cannot be so waived by the federal government. *See e.g. Pavone Inc. v. Secretary of Housing and Urban Development*, 547 F. Supp. 230 (D.Conn. 1982); *Continental Imports Inc. v. Macy*, 510 F.Supp. 64 (E.D.Penn. 1981); *Parnell v. FEMA*, No. CV 81-3216-R (C.D.Cal., Unpublished Findings of Fact and Conclusions of Law, filed March 15, 1982). Waiver can only be in writing as set forth in Paragraphs O and D.

More generally, the United States Supreme Court has held that, as a condition precedent to maintaining an action against the federal government on an insurance policy, there must be compliance with the terms and conditions of the government-issued insurance policy. *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380, 384-85 (1947). All courts, observed the Supreme Court, have a duty to "observe the conditions defined by Congress for charging the public treasury." *Id.*, at 385. Further, the 9th Circuit, following *Merrill*, held in a case involving the Federal Crop Insurance Program that the plaintiffs' failure to submit a proof of loss barred any recovery; the United States had not waived nor was estopped from asserting this defense by any actions of its agents. *Roberts v. Federal Crop Insurance Corporation*, 158 F.Supp. 688 (E.D.Wash. 1958), *aff'd* 260 F.2d 958 (9th Cir. 1958). (Although *Roberts* involved the Federal Crop Insurance Program, the crop insurance policy in *Roberts* contained substantially the same requirements as in Paragraphs O, T, and D of the Standard Flood Insurance Policy. *Id.*, at 691).

ACCORDINGLY, IT IS ORDRED that defendants FEMA and EDS's motion for summary judgment in plaintiff's underlying action should be and hereby is granted, and;

IT IS FURTHER ORDERED that all further proceedings in plaintiff's action against Jack Carlisto Enterprises, Inc. and in all related cross-actions will be stayed until final disposition of any appeal of this order. If no appeal is taken within the prescribed time, the stay will be lifted.

DATED: April 15, 1983.

United States District Judge

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG -7 1984
PHILLIP B. WINGERAY
CLERK, U.S. COURT OF APPEALS

CITY OF OCEANSIDE, Plaintiff-Appellant, vs. FEDERAL EMERGENCY MANAGEMENT AGENCY, Defendant-Appellee.	No. 83-5747 ORDER DENYING PETITION FOR REHEARING AND DENYING REQUEST FOR PUBLICATION

Before: ELY, PREGERSON, and ALARCON, Circuit Judges.

Appellant's petition for rehearing is denied.

Appellee's request for publication is also denied.

No. 84-814

Office-Supreme Court, U.S.
FILED
JAN 28 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF OCEANSIDE, PETITIONER

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner, a California municipality, contends that respondent Federal Emergency Management Agency (FEMA) should have been estopped from denying coverage under a federal flood insurance policy on the basis of petitioner's failure to file a proof of loss form within 60 days of the loss, as required by the Standard Flood Insurance Policy.

1. Under the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, the federal government makes flood insurance available on reasonable terms to "persons who have need for such protection." 42 U.S.C. 4001(a). The standard insurance contract issued by FEMA makes the filing of a sworn proof of loss within 60 days of a flooding incident a condition precedent to recovery under the contract. See 44 C.F.R. Pt. 61 App. A(2), ¶ P at 221; *id.* ¶ U at 222; 44 C.F.R. 61.13.

FEMA issued a flood insurance policy covering the contents of a structure owned by petitioner. That policy contained the standard provision that in the event of loss petitioner was required to present FEMA with a proof of loss form within 60 days in order to recover on the policy. On February 18, 1980, petitioner's sewage treatment plant was damaged by flood waters. Petitioner filed a notice of loss estimating the amount of damage on April 2, 1980; however, it never filed the proof of loss form required by the policy. On December 12, 1980, FEMA denied petitioner's claim on the ground that the damaged equipment was located outside the structure whose contents were insured under the policy. See Pet. App. B2.

Petitioner brought suit in the United States District Court for the Southern District of California seeking enforcement of the insurance contract. FEMA filed a motion to dismiss or, in the alternative, for summary judgment, contending, inter alia, that petitioner's claim was barred by its failure to file a sworn proof of loss within 60 days of the loss. The district court granted summary judgment for FEMA on that basis (Pet. App. B1-B4). The court rejected petitioner's claim that FEMA should be estopped from relying on the failure to file a proof of loss because the agency was aware of the loss, had failed to provide petitioner with a proof of loss form, and had conducted an investigation of the loss.

The court of appeals affirmed in an unpublished memorandum opinion (Pet. App. A1-A5). The court held that petitioner had not established the traditional elements necessary to estop a private litigant, let alone the heightened requirements for an estoppel against the government. The court concluded that there was no reason for petitioner to be ignorant of the proof of loss requirement and that

petitioner's failure to file a proof of loss was not due to any reliance on the statements or conduct of government agents.

2. Petitioner's contention that the courts below erred in refusing to estop FEMA from denying coverage based on petitioner's failure to file a timely proof of loss form is without merit.[1] As this Court recently noted, "it is well-settled that the Government may not be estopped on the same terms as any other litigant." *Heckler* v. *Community Health Services,* No. 83-56 (May 21, 1984), slip op. 8. *Community Health Services* makes clear that, at a minimum, a private party seeking to estop the government must demonstrate with clarity that all the traditional elements for estoppel of a private party are present. *Id.* at 9.

The court of appeals correctly concluded that the undisputed facts in the record demonstrated that petitioner could not establish two elements necessary to estoppel of a private party. First, there was no reason for petitioner to be ignorant of the true facts, since the Standard Flood Insurance Policy, 44 C.F.R. Pt. 61 App. A(2), at 221, clearly sets forth the proof of loss requirement and since petitioner acknowledged that its employees had access to the policy and were familiar with its terms. See Pet. App. A4. Second, petitioner failed to show reasonable reliance on any statements or conduct of government agents; indeed, petitioner's employee testified that "he relied on his experience that private insurance companies waived proof of loss, '99.9% of the time * * *.' " *Ibid.* Thus, on these facts even a private insurance

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[1]Petitioner's second question presented refers to the possibility that FEMA might be deemed to have waived the proof of loss requirement in this case. However, paragraph D of the Standard Flood Insurance Policy states that no provision of the policy may be waived, except in writing. See 44 C.F.R. Pt. 61 App. A(2), at 217. It is undisputed that there was no written waiver of the proof of loss condition in this case. See Pet. App. A3.

company could not have been estopped. See *Goodwin* v. *Hartford Life Insurance Co.*, 491 F.2d 332 (3d Cir. 1974) (declining to estop an insurance company from denying liability where eligibility for coverage was defined in the insurance policy and contract).[2]

3. Petitioner contends that there is a conflict among the circuits with respect to whether FEMA may rely on the proof of loss requirement when the agency has received actual notice of a claim, but has failed to request submission of a proof of loss form, and a claims adjuster continues to investigate the loss after the expiration of the 60-day period within which the proof of loss is to be filed. It relies primarily on *Meister Bros., Inc.* v. *Macy*, 674 F.2d 1174 (7th Cir. 1982). But the court in *Meister Bros.* stated expressly that its decision was "limited to the unique circumstances of this case" and was not intended "to intimate in any way an appropriate standard for resolution of future cases" (*id.* at 1177). The court held there that FEMA could not rely on the plaintiff's failure to satisfy the proof of loss requirement when sworn proof of loss statements were filed several months late by the plaintiff, the claim was thoroughly investigated, and partial payment was made on the claim. In the court's view, it would have been inequitable under these circumstances to deny plaintiff full recovery simply because the proof of loss form had not been filed

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[2]Petitioner characterizes the requirement that a proof of loss be tendered within 60 days as a "technical policy condition" (Pet. i). In fact, the requirement is an important one. It is designed, inter alia, to expedite the orderly processing of claims; to enhance the prospects for settlement; to ensure against fraud (which is more likely to occur when the claims process is extended and a claimant is not required to assess and swear to the amount of his estimated loss); and to enable FEMA to determine actuarially the amount of short-term reserves that will be necessary to satisfy claims. While in some cases a notice of loss form or investigation by an adjuster might serve some of these purposes, they clearly would not serve all of them.

precisely within 60 days. In this case, by contrast, no proof of loss form was ever filed, and no payments were made to petitioner.

Moreover, in *Meister Bros.*, unlike this case, the court did not make any finding that the plaintiff would have been unable to prove the elements of estoppel against a private party. Indeed, the court there noted specifically (674 F.2d at 1176) that FEMA "does not contend that the traditional elements of estoppel are not present." On that ground alone, this case is clearly distinguishable from *Meister Bros.*[3] Furthermore, since *Meister Bros.* was decided before

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[3]The court in *Meister Bros.* stated that FEMA, in issuing flood insurance, "was not in any sense acting in a sovereign capacity * * * but was engaged in essentially a private business." 674 F.2d at 1177. But this Court long ago held that provision of insurance by the federal government "is not an ordinary commercial undertaking, and * * * the rules of law whereby private insurance companies are rendered liable for the acts of their agents are not bodily applicable to a Government agency * * * unless Congress has so provided." *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 383 n.1 (1947). See also *id.* at 383 ("[i]t is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures"). Indeed, Congress created the flood insurance program "as a matter of national policy" (42 U.S.C. 4001(a)(3)), based on the finding that "many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions" (42 U.S.C. 4001(b)(1)).

Petitioner also cites *West Augusta Development Corp.* v. *Giuffrida,* 717 F.2d 139 (4th Cir. 1983), in support of its claim that there is a conflict among the circuits. But that decision is entirely consistent with the decision in this case. In *West Augusta Development Corp.*, as in this case, the court concluded that the plaintiff could not estop FEMA because it had failed to make out the elements of estoppel against a private party, in particular the requirement of reasonable reliance. See *id.* at 141.

this Court issued its decision in *Community Health Services*, the extent to which *Meister Bros.* remains good law is uncertain. Finally, because the court of appeals' opinion in this case is unpublished, any conflict would be of minimal significance and would not warrant the Court's attention.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1985

DOJ-1985-01